United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original Affidavit of Mailing

74-1972

To be argued by
JOAN S. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1972

UNITED STATES OF AMERICA,
Appellee,

—against—

VITO DiBARTOLO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Vito Jack DiBartolo appeals from a judgment of the United States District Court for the Eastern District of New York (Dooling, *J.*), entered on April 26, 1974, following his plea of guilty to one count (of a thirteen count indictment), which count charged him with the knowing possession of a check stolen from the United States mail, with knowledge that the check was stolen in violation of Title 18, United States Code, Section 1708.

Appellant was sentenced to a term of imprisonment of two years, pursuant to Section 4208(a)(2), and is presently on bail pending the appeal.

On appeal, appellant argues as error the District Court's refusal to allow him to withdraw his plea of guilty.

Statement of Facts

On December 30, 1971, appellant was indicted on thirteen counts, six counts charging DiBartolo with forging six United States Treasury checks in violation of Title 18, United States Code, Section 495 and seven counts charging him with the unlawful possession of the same six checks as well as an additional one, which checks had been stolen from the mail in violation of Title 18, United States Code, Section 1708. On January 7, 1972 appellant appeared before the Honorable Jacob Mishler with his attorney, Vincent Tomaselli, and entered a plea of not guilty. On February 2, 1973, the Honorable George Rosling severed appellant's trial from that of the fugitive co-defendant, Aida Pagan. The case was subsequently reassigned to the Honorable John F. Dooling and trial was set for August 20, 1973. On August 20, 1973, appellant's attorney indicated appellant's desire to enter a guilty plea but requested that the plea be postponed until September 14, 1973. The date for the entry of the plea was subsequently postponed from September 14, 1973 until October 15, 1973. On October 15, 1973 appellant and his attorney Tomaselli appeared before Judge Dooling requesting an adjournment until November 2, 1973. On November 2, 1973, appellant and counsel again requested an adjournment and the Court ordered that in the absence of a disposition, trial was to commence on February 11, 1974.

On February 11, 1974, appellant's attorney, Vincent Tomaselli, informed the Court of appellant's desire to plead to Count 7 in satisfaction of the remaining twelve counts in the indictment (T.P. 3)*. The Court thereupon read to DiBartolo the substance of Count 7 and asked:

"do you understand the charge and what they are

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* T.P. refers to the transcript of the minutes of the plea on February 11, 1974.

> talking about; that you had this check in your hand and that you knew it was a mailed check, a check that had been mailed to him and that it was stolen: do you understand that? (T.P. 4).

Appellant responded, "I understand what you say. I don't say I stole it or not" (T.P. 4).

There was a subsequent conversation between appellant and his attorney after which Tomaselli responded:

> His interpretation is as follows. He had the check in his possession. I just reiterated it in Italian what the situation was. He said he had the check in his possession. He knew the check wasn't 100 percent good. This is his words to me—however, he did not actually know that it was stolen. In other words, he didn't see anybody steal it but he knew the check was not a bona fide check.

The Court further inquired:

> The Court: You knew that the man who gave it to you wasn't Mr. Carponeta?
>
> Mr. Tomaselli: Tell the Judge.
>
> Mr. DiBartolo: Yes.
>
> The Court: And you strongly suspected that it had been stolen.
>
> Mr. DiBartolo: Yes, I know it was something.
>
> The Court: In other words, the circumstances in which you received the check made you understand that something was wrong with it?
>
> Mr. Tomaselli: He says the individual brought it in, didn't tell him but he understood there was something wrong with the check.
>
> The Court: You could tell from what he wanted for it, right?
>
> Mr. DiBartolo: Yes.
>
> The Court: In other words, he didn't expect to

get from you the whole face amount of the check?

Mr. Tomaselli: He said he told the individual he couldn't give him all the money. He gave him a portion, that he left and he knew he wouldn't be back.

The Court: All right. I think that's enough to convince a jury that you knew it was stolen (T.P. 4-5).

The Court thereafter informed appellant of his rights to a jury trial with an attorney, to the cross-examination of Government witnesses, to subpoena favorable witnesses, to remain silent at trial and of the Government's burden of proof (T.P. 5-7).

The Court further advised that Mr. DiBartolo had no right to appeal after the entry of a plea, to which Mr. DiBartolo responded "Excuse me. One question" (T.P. 7). Although the transcript does not indicate, there was some discussion between appellant and his attorney, for the next statement was that of Mr. Tomaselli stating: "He understands that, Judge" (T.P. 7).

The Court informed appellant of the maximum penalty, and ascertained that no promises or threats had been made to appellant with the exception of the agreement to dismiss the remaining counts (T.P. 7-9).

Judge Dooling thereafter returned to the question of appellant's knowledge of the stolen check:

The Court: You got the check from a person you knew was not Daniel Carponeta?

Mr. DiBartolo: Yes, because he left the check and not all the money given to him.

The Court: And that you got from him by giving him only part of what the check said it was for?

Mr. DiBartolo: Supposed to come back, the man never showed up for the rest.

The Court: You knew he wasn't going to come back, is that right?

Mr. DiBartolo: Say come back, never come back.

The Court: And then you put the check through?

Mr. DiBartolo: Yes.

The Court: The plea of guilty on Count 7 is entered (T.P. 9).

On April 26, 1974, Mr. Tomaselli appeared as counsel to appellant for sentencing. At this time the Court inquired of appellant if he was satisfied with Mr. Tomaselli's acting as an interpreter (T.S. 5).* Mr. Tomaselli informed the Court of DiBartolo's desire that Tomaselli interpret, adding that he, Tomaselli, spoke the same dialect as appellant, i.e., Sicilian, and that his Sicilian was "quite good" (T.S. 5-6). The Court requested that Tomaselli, "stop after each sentence and translate it to him" (T.S. 6). Mr. Tomaselli proceeded to comment about various items in appellant's pre-sentence report (T.S. 6-14). The Court then sentenced appellant to a term of imprisonment of two years pursuant to Title 18 United States Code Section 4208(a)(2). The remaining counts of the indictment were dismissed (T.S. 15-16).

On May 20, 1974, appellant, with new counsel, moved to vacate the sentence and the judgment of conviction and further to allow appellant to withdraw his guilty plea on the grounds that appellant misunderstood the nature of the charge to which he had entered a guilty plea.

In an affidavit filed with this motion, appellant alleged that the "evidence leading up to the plea of guilty on February 11, 1974 . . . demonstrates that because of my inability to fully understand the English language, I

* T.S. refers to the minutes of the sentencing on April 26, 1974.

believed that I was guilty simply because I possessed the check in question, even though [I] did not actually know it was stolen. . . . I believe the minutes will demonstrate that it was not explained to me that a jury would have to consider the issue of knowledge and find beyond a reasonable doubt that I *knowingly* possessed the check before I could lawfully be found guilty. I thought that my possession alone was sufficient to bring about a conviction." The affidavit referring to what the "record" would indicate (rather than appellant's personal recollection) further alleged that "while my then attorney occasionally translated for me, on most occasions including the important matters, he did not translate for me, resulting in the misunderstanding set forth above" (Appellant's Appendix at A-75).

A hearing on this motion was held on June 14, 1974. It should be noted that the appellant failed to appear at this hearing although proper notice was given (T.H. 3, 54.)* Appellant's new attorney, Mr. Sonenshine, proceeded, however, to call as his witness the previous counsel, Vincent Tomaselli (T.H. 6). Tomaselli testified that he had known Vito DiBartolo for seven or eight years and had represented him in civil and other criminal matters (T.H. 30-31). Tomaselli would converse with the appellant not only in Sicilian, a dialect of Italian spoken by DiBartolo, but also in English (T.H. 31-32). According to Tomaselli, DiBartolo's English was "adequate" and he presumed that the appellant served primarily English-speaking people in the butcher shop, pizzeria and laundromat which appellant owned in areas of Brooklyn and Queens (T.H. 32-33). Tomaselli asserted that he spoke Sicilian, the same dialect as the appellant, and at the time of appellant's plea he would interpret from the Sicilian idiomatically if there were no identical English words which would convey the sense of the Sicilian ones (T.H. 10, 34).

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* T.H. refers to the minutes of the hearing on June 14, 1974.

Tomaselli was shown specific portions of the plea transcript and questioned as to his interpretation and his own understanding of appellant's statements in Sicilian. First, appellant's new counsel referred to the translation given by Tomaselli that appellant "gave [the unidentified man] a portion, that he left and he knew he wouldn't be back" (T.P. 5; T.H. 16). Tomaselli stated at the hearing that although he had received no specific statement from the appellant as to the time at which DiBartolo had concluded that the man would not return for the remaining portion of the check, he, Tomaselli, drew the inference from the total of his discussion with DiBartolo that DiBartolo realized at the time he made partial payment that it was very likely that he would never return (T.H. 13-18, 21). Nothing in his discussion with DiBartolo alerted Tomaselli to the possibility that DiBartolo was a victim of a man who had passed a bad check rather than a knowing participant in a criminal venture (T.H. 19-20).

Reference was also made to Mr. Tomaselli's statement at the plea that appellant had informed him that the check was not "100 percent good" (T.P. 4; T.H. 39). Tomaselli testified at the hearing that he understood from his discussion with appellant that appellant knew the check was not "100 percent good" at the time it was handed to him (T.H. 40). Tomaselli also stated that DiBartolo had no language difficulty in directly responding affirmatively to the Court's question as to his knowledge that the man presenting the check was not the payee Carponeta (T.P. 4; T.H. 40). Tomaselli also testified that appellant understood that he could not go to jail merely for possessing the check (T.H. 41, 42).

Because of the failure of the appellant to appear, the Court closed the hearing with leave to reopen it if necessary (T.H. 56). At the conclusion of the hearing the Court noted that appellant left a "very clear impression that not one word that went on here in court was missed" by

him and that he "knew what was going on here and meant to preserve as much position and face as he could" (T.H. 60).

By Memorandum and Order dated June 21, 1974, the District Court denied appellant's motion to set aside the judgment of conviction and to withdraw his plea of guilty stating that appellant understood the nature of the charge although he avoided making an unrestricted admission of his knowledge. DiBartolo was "manifestly astute enough to realize that, since he was charged only with guilty possession, he could not be supposed to have observed or participated in the actual theft, and that he could, therefore, for semantic purposes, deny that he 'knew'—in the most ultimate and primary sense of that word—that the check was stolen." The Court further held that although language difficulty was not entirely absent, it "did not impair the facility and the completeness of the defendant's grasp of the plea events and the supposed failure accurately to translate in and out of the Sicilian dialect did not exist", especially in light of the lengthy period of time that Tomaselli and DiBartolo had known each other. Accordingly, appellant intentionally confined himself to an "admission of the evidentiary basis of his guilty knowledge" (Appellant's Appendix at A-75, A-76).

ARGUMENT

Appellant's motion to withdraw his previously entered plea of guilty was properly denied.

Appellant claims as error Judge Dooling's failure to allow a withdrawal of the guilty plea on the grounds that the District Court failed to adequately comply with Rule 11 of the Federal Rules of Criminal Procedure in that the Court failed to ascertain (1) the appellant's understanding of the nature of the plea and (2) the factual basis for the plea. It is also urged that Judge Dooling erred in failing

to inquire of the appellant if an official court interpreter was necessary to aid the appellant in entering his plea.

Clearly, this Court may review the record of the plea to determine if Judge Dooling has complied with the requirements of Rule 11. *See McCarthy* v. *United States*, 394 U.S. 459 (1968). Once this Court determines that Rule 11 requirements have been satisfied, however, then this Court may review factors outside the record only if the District Court engaged in an "abuse of discretion" by refusing to allow these factors to form the basis for the withdrawal. *See United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972). Here, the District Court fully complied with Rule 11 and there exists no other factors which indicate that the District Court abused its discretion in refusing to allow withdrawal of the plea.

Undoubtedly, Rule 11 requires the District Court to personally address the defendant to ascertain if the "plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea" and further to satisfy itself that "there is a factual basis for the plea." F.R. Crim. P. 11. Here, the transcript of the plea clearly indicates that Judge Dooling complied with both of these requirements.

At the outset, the Court read to the appellant the substance of the indictment and tried to ascertain the extent of appellant's understanding of the charge, by first explaining to the appellant that he was charged with possessing a check mailed to another with knowledge that it was stolen * (T.P. 3-4). Appellant immediately responded, with-

* Under Section 1708 of Title 18, the Government must prove that the defendant possessed a check, which was stolen from the mail and that the defendant knew that the check was stolen. It does not have to prove that appellant knew the check was stolen from the mail. *United States* v. *Hines*, 256 F.2d 561 (2d Cir.

[Footnote continued on following page]

out the aid of translation, "I understand what you say. I don't say I stole it or not" (T.P. 3-4). This fairly sophisticated response demonstrated to the Court that appellant had understood the distinction drawn by the Court. See T.H. 39. After further inquiry by the Court, there was a brief discussion between appellant and counsel. Tomaselli, appellant's counsel for eight years, answered that although appellant "did not actually know" that the check was stolen and did not actually see anyone steal it, he did know that it "wasn't 100 percent good" (T.P. 4). When the Court asked if DiBartolo knew that the man who gave him the check wasn't Mr. Carponeta, appellant himself affirmed "yes" (T.P. 4). When directly asked if he strongly suspected the check to have been stolen, DiBartolo responded "yes, I knew it was something" (T.P. 4). To establish a more complete factual basis for the plea, the Court asked for further facts surrounding DiBartolo's possession. After conference, Tomaselli informed that an individual brought the check in, told appellant nothing but that appellant understood that there was something wrong with the check (T.P. 5). DiBartolo answered "yes" to the Court's further question of whether DiBartolo knew there was something wrong from what this man wanted for the check (T.P. 5). When the Court later returned to further question DiBartolo and asked once again if he knew that the man who presented the check was not Carponeta, DiBartolo again responded, "Yes, because he left the check and not all the money given to him" (T.P. 9). DiBartolo knew that this man would "never come back" and "then . . . put the check through" (T.P. 9). These answers given primarily by DiBartolo himself and amplified by Tomaselli, demonstrate the extent to which appellant fully

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1958). Nor must the Government prove the identity of the thief. A jury may find that a letter "properly mailed and never received by the addressee, but found in quite improper and misusing hands, can be found to have been stolen from the mails in the absence of any other explanation." *United States* v. *Hines, supra* at 564; *United States* v. *Lopez*, 457 F.2d 396, 400 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972).

understood his rights and the consequences of his plea. Additionally, the Court had indeed established that there was a factual basis for the plea. Although DiBartolo did not express direct knowledge of the stolen nature of his check, he did admit to receiving, as a grocer, one check* dated on the day he received it and to paying an unidentified individual less than the face amount of the check, with knowledge that this man would not be returning for the rest of the money (T.P. 4-5; T.H. 58-60). Such facts are sufficient to warrant a jury to find beyond a reasonable doubt that appellant had actual knowledge that the check was stolen or had at least deliberately and consciously avoided learning of the nature of his transaction and deliberately closed his eyes to what he had reason to believe was a stolen check. *See*, e.g., *Turner* v. *United States*, 396 U.S. 398, 416 n. 29 (1970); *Leary* v. *United States*, 395 U.S. 6, 46 n. 93 (1969); *United States* v. *Jacobs*, 475 F.2d 270, 287-88 (2d Cir. 1973), *cert. denied*, 414 U.S. 821 (1973); *United States* v. *Joly*, No. 73-2681 (2d Cir. Mar. 12, 1974), slip op. 2053, 2055-58, 2060; *United States* v. *Olivares-Vega*, No. 73-2532 (2d Cir. Apr. 3, 1974), slip op. 2657, 2661-2663; *United States* v. *Sarantos*, 455 F.2d 877, 880 (2d Cir. 1972); *United States* v. *Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); *United States* v. *Squires*, 440 F.2d 859, 863 (2d Cir. 1971). *See also, United States* v. *Garrett*, 457 F.2d 1311, 1312 (9th Cir. 1972); *United States* v. *Schultz*, 462 F.2d 622, 623 (9th Cir. 1972) (possession of recently stolen checks raises an influence absent explanation, that possessor knew it to be stolen); *accord, Rugendorf* v. *United States*, 376 U.S. 528, 536-537 (1964) (recent possession of stolen furs). The court strictly adhered to the mandates of Rule 11 and satisfied itself of appellant's understanding and of the factual basis for the plea.

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* The indictment charges DiBartolo with possession of five checks dated March 27, 1970. Government's Appendix A-4 to A-6.

Appellant's further claim, that the District Court erred in failing to provide appellant with an official court interpreter, is equally without merit. In the first place, only an indigent can assert the right to a court-appointed interpreter. *See United States* v. *Desist,* 384 F.2d 889, 901-903 (2d Cir. 1967); Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e). Since DiBartolo was not indigent, he had the obligation to provide an interpreter if he felt that one was necessary. Since he chose his attorney, Tomaselli, to be his interpreter, he should not now be allowed to attack Tomaselli's competency in Sicilian.

Furthermore, assuming that the District Court was empowered to appoint an interpreter, the record clearly indicates that an additional interpreter was unnecessary. The appointment of an interpreter is solely a matter within the discretion of the District Court. *Perovich* v. *United States,* 205 U.S. 86, 91 (1907); *United States* v. *Desist, supra; United States* v. *Carrion,* 488 F.2d 12 (1st Cir. 1973). In accepting a plea of guilty, the Court need not appoint an interpreter if the defendant has a sufficient understanding of English and can sufficiently communicate with his attorney. *Cervantes* v. *Cox,* 350 F.2d 855 (10th Cir. 1965); *Orosco* v. *Cox,* 359 F.2d 764 (10th Cir. 1966); *Reyes* v. *Cox,* 336 F. Supp. 829 (W.D. Va. 1971); *cf. United States* v. *Desist, supra* (need for interpreter at trial). Clearly, the Court was justified in concluding that no additional interpreter was necessary. In the first place, the appellant and his counsel had appeared before the District Court on several occasions prior to the date of the plea and the Court had an adequate opportunity to observe appellant and ascertain the degree of his understanding in English. Secondly, at each court appearance appellant and Tomaselli, his counsel, appeared without any other interpreter. Additionally, neither appellant nor counsel ever communicated to the Court any difficulties in comprehending English or the need for an official interpreter, until the filing of the motion to vacate the sentence. Tomaselli spoke the Sicilian

dialect fluently and had maintained an attorney-client relationship with appellant for a period of seven or eight years. Additionally, appellant had operated a number of small businesses catering to a primarily non-English-speaking public. This fact plus his own responses to the Court inquiries demonstrate that appellant had a sufficient understanding of English to grasp all the events surrounding his plea and whatever language difficulty he may have had was cured by the presence of his own interpreter, his attorney, Tomaselli. It is apparent that appellant's claims, after sentencing, of a failure to understand the nature of the plea because of a language difficulty with his prior counsel, arise not out of an honest claim of innocence, but rather a disappointment with the Court's sentence. Such a disappointment forms no basis for review of the District Court's refusal to allow the withdrawal of the guilty plea. *United States* v. *Norstrand Corp.*, 168 F.2d 481, 482 (2d Cir. 1948). To allow a withdrawal of the guilty plea, after sentence would also create a significant prejudice to the prosecution. *See United States* v. *DeCavalcante*, 449 F.2d 139 (3d Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). The Government was prepared to go to trial on February 11, 1974, the date appellant entered his plea. The United States Marshal's Service had subpoenaed and the Government actually paid ten witnesses who had appeared in the courthouse on that date. [See Government's Appendix A-21 to A-41]. One witness had come from Newport News, Virginia [See Government's Appendix A-31], two witnesses from East Hampton, New York [See Government's Appendix A-32, A-33], and two witnesses from Port Washington, New York [See Government's Appendix at A-34, A-35]. At least three of the witnesses were owners of grocery stores or pizzerias [See Government's Appendix at A-36, A-37, A-40]. In all, the time and expense of the Government and of the citizens who appeared as witnesses on February 11, 1974 has already been quite substantial and to allow a withdrawal of appellant's guilty plea would substantially prejudice the interests of the Government by unduly burdening its witnesses.

In summary, the Court fully complied with the Rule 11 mandates and has demonstrated no abuse of discretion. Accordingly, the judgment of conviction should be affirmed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

September 16, 1974

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Deborah J.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 19th day of September 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a two copies of the Brief for the Appellee and Appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Evseroff and Sonenshine, Esqs.
186 Joralemon Street
Brooklyn, New York 11201

Sworn to before me this
19th day of Sept. 1974

Irene B. Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0493765
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN